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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 444

WILLIAM WORTHY, JR.,

Petitioner,

v.

CHRISTIAN A. HERTER, Secretary of State.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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CHRISTIAN A. HERTER, Secretary of State.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

William Worthy, Jr. respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia, entered in the above entitled case on June 9th, 1959, affirming summary judgment against the petitioner entered in the United States District Court for the District of Columbia in a suit brought to order the Secretary of State to renew or issue a passport to petitioner.

Opinions Below

The opinion in the Court below has not yet been reported; it appears as Appendix A hereto. The opinion of the District Court was not reported; it is printed at R. 101.

Jurisdiction

The judgment of the Court of Appeals was entered on June 9th, 1959 (Appendix C, *infra*). The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

Questions Presented

1. Whether the President has, through his agent the Secretary of State, the inherent power, in the absence of statute, to prevent travel by American citizens to certain countries of the world and, in particular China and Hungary, and to refuse to renew or issue passports for such travel.

2. Whether the Secretary of State has the statutory authority

(a) to deny a passport for past conduct;

(b) to exact commitments as to future conduct as a condition to the issuance or renewal of a passport;

(c) to prevent American citizens from traveling to certain countries of the world, and, in particular, China and Hungary, by incorporating in their passports provisions restricting travel to those countries and by imposing civil and criminal sanctions in the event of such travel.

(d) to permit certain selected American citizens to travel to such interdicted countries while prohibiting others from doing so.

3. Whether the Secretary of State has the power to determine the persons who may travel to such countries and the purposes for which such travel is valid.

4. Whether the Secretary's regulations restricting such travel abridge petitioner's First Amendment rights of

freedom of assembly, speech and press and deprive him of his right to travel to earn a livelihood and to due process under the Fifth Amendment to the Constitution.

5. Whether the Secretary's regulations violate the Ninth Amendment by basing the denial to renew or issue petitioner's passport on his past conduct, as well as deny and disparage one of the most fundamental of the unenumerated rights, that of free movement.

Constitutional Provisions, Statutes and Regulations Involved

The constitutional provisions involved are Article 1, Sections 8(3) and 9(3); Article IV, Section 2(1); and the First, Fifth and Ninth Amendments to the Constitution. The statutes involved are the Act of July 3, 1926, c. 772, s. 1, 44 Stat. 887, 22 U. S. C. 211(a); the Act of June 14, 1902, c. 1088, s. 2, 32 Stat. 386, 22 U. S. C. 212; the Internal Security Act of 1950, s. 6, 64 Stat. 993, 50 U. S. C. 785; the Immigration and Nationality Act of 1952, s. 215(a), 66 Stat. 190, 8 U. S. C. 1185; and the Expatriation Act of 1868, 15 Stat. 223-224, R. S. s. 1999. These statutes and the pertinent provisions of the Passport Regulations are reproduced in Appendix A, *infra*.

Statement of the Case

1. The Proceedings in the State Department.

This case arises as a result of a passport renewal application rejected by the Secretary of State under his Passport Regulations of August 28th, 1952. Those regulations provide, in part, that no passport shall be issued to a person "when it appears to the satisfaction of the Secretary of State that the person's activities abroad would: (a) violate the laws of the United States; (b) be prejudicial to the orderly conduct of foreign relations; or (c) otherwise

be prejudicial to the interests of the United States." (s. 51. 136). The regulations further provide that the Secretary of State may "refuse to issue a passport, to restrict its use to certain countries, to withdraw or cancel a passport already issued, or to withdraw a passport for the purpose of restricting its validity or use in certain countries." (s. 53.8). At the present time, with the exception of travel to certain countries in the Western Hemisphere, a citizen cannot lawfully depart from or enter the United States without a passport (8 U. S. C. 1185; Proc. No. 3004, 67 Stat. c. 31).

William Worthy, Jr., a foreign correspondent whose professional work requires his presence abroad, obtained and used a passport in 1955 and thereafter, for that purpose (R. 3). In 1957, he applied for its renewal to enable him to continue his foreign reporting (R. 3). The Director of the Passport Office disapproved his request "tentatively", under s. 51. 136 of the Passport Regulations on the following grounds:

> "After careful consideration of your case, the Department has concluded that your application for renewal of your passport should be tentatively denied under the provisions of Subsections (2) and (3)* of Section 51.136 of the Passport Regulations * * *.
>
> This action is predicated upon your recent travel to and within Communist China which was contrary to known and existing United States foreign policy and was otherwise prejudicial to the interests of the United States. Your travel in Communist China and in Hungary was in violation of the restrictions placed in passport number 558363. On the basis of recent statements attributed to you in the public press and on statements made by Mr. McKay (petitioner's editor) in support of your application there is reason to believe that you will not abide by geographical limitations of general applicability which may be placed in the passport" (R. 9). (Material in parentheses supplied.)

* Now (b) and (c).

Mr. Worthy appeared with counsel at an informal "hearing" in the Passport Office (R. 4). Following this "hearing", petitioner was informed by the Acting Director of the Passport Office that his renewal application had been finally refused "under the provisions of Section 51:136 of the Passport Regulations" (R. 20), on the following grounds:

> "Your testimony at the informal hearing and the admissions made by your counsel subsequent thereto clearly establishes that if your passport were renewed, you would again use it contrary to restrictions endorsed therein and travel in contravention of known and existing foreign policy of the United States.
>
> Use of your passport in connection with your travel to and in Communist China is contrary to known and existing United States foreign policy and is otherwise prejudicial to the interests of the United States, in that (a) the United States and the United Nations are in a state of unresolved conflict with Communist China; (b) the Communist Chinese threat against the Republic of China with which the United States has a treaty of mutual defense, remains clear and present; (c) the United States does not recognize the Chinese Communist regime and no consular protection for United States citizens traveling there is possible, a situation that is highlighted by the fact that the Chinese Communists have taken and are still holding political hostages; (d) the Chinese Communist regime came into power by armed insurrection and has consolidated its position by a series of lawless acts, including the invasion of North Korea and the attack on United Nations forces there, the illegal imprisonment of American citizens and flagrant violations of the Korean armistice agreement" (R. 19).

Petitioner appealed this final refusal to the Board of Passport Appeals of the State Department, and the decision of the Passport Office was affirmed by the Secretary of State on the following grounds:

> "On the basis of past conduct and other evidence of future intent, I have reason to believe that William Worthy, Jr., would, if his passport were renewed, violate limiting and restricting endorsements contained therein, necessitated by foreign policy consideration. Accordingly, I have concluded that his activities abroad, at this time, would be prejudicial to the orderly conduct of the foreign relations of the United States.' I have reached this conclusion on the foregoing findings which are based on information contained in the open record, including applicant's own statements. The passport renewal application of William Worthy, Jr., is therefore denied under Section 51.136 (2) of the Passport Regulations and in order to promote and safeguard the interests of the United States" (R. 24).

2. The Proceedings in the Courts Below.

Petitioner instituted a lawsuit in the District Court for a decree adjudging (1) that he was entitled to a passport and (2) directing that his passport be renewed. Jurisdiction was invoked under the Administrative Procedure Act, 5 U. S. C. 1009, the Declaratory Judgment Act, 28 U. S. C. 2201 and D. C. Code ss. 11-305, 11-306. Petitioner moved for summary judgment upon his complaint and supporting affidavits; and the Secretary of State cross-moved for summary judgment upon supporting affidavits.

The District Court granted the Secretary's motion for summary judgment and dismissed petitioner's complaint, basing its decision on the ground that

> "* * * Within the reasonable and proper exercise of foreign relations, the President of the United States may properly restrict the travel of certain citizens to certain designated geographical areas of the world when necessitated by foreign policy considerations."

The Court of Appeals affirmed the judgment of the District Court. Its unanimous opinion was written by

Chief Judge Prettyman. Judge Prettyman distinguished this case from *Briehl* v. *Dulles* and *Kent* v. *Dulles*, both sub nom. *Kent* v. *Dulles*, 357 U. S. 116, on the ground that the refusal to renew petitioner's passport did not rest upon "beliefs, associations or personal characteristics" but rather on a general, nondiscriminatory policy of forbidding travel to China and other Communist-controlled areas of the world. (Opinion, p. 2). He stated that the State Department policy was based on foreign policy considerations which are traditionally beyond judicial inquiry. In his words "In foreign affairs, especially in * * * today's world of jets, radio and atomic power, an individual's yen to go and to inquire may be circumscribed. A blundering inquisitor avowing his own freedom to go and do as he pleases can throw the whole international neighborhood into turmoil." (Opinion, p. 10). It was the Court's opinion that the Passport Regulations are authorized by the foreign affairs power of the President and by the statutes which empower the Secretary to issue passports (22 U. S. C. 211a) and which make travel without a passport illegal (8 U. S. C. 1185). (Opinion, p. 12)

Reasons for Granting the Writ

The Court below in this case has decided important questions of federal law which have not been, but should be, settled by this Court; and it has, in some respects, decided those questions in a way which conflicts with applicable decisions of this Court.

The questions decided here stem from the Secretary of State's imposition of area restrictions on the issuance of passports to American citizens. Early authoritative adjudication of those questions by this Court is vital to the proper administration of the passport laws and to a definition of the citizen's constitutional rights in the field

of foreign travel. The previous Secretary himself recognized the urgency of a ruling by this Court.[1]

The questions presented are of recent vintage. Until the last decade, the Government imposed no general area restrictions on the right to travel of the type we are concerned with here. In fact, blanket restrictions have never been applied in our long history, and in those instances where a particular locality has been closed to travel by the general public, either this country was at war with the interdicted country, or the latter was involved in hostilities with a third country or undergoing a civil war. Freedom to Travel, Report of the Special Committee to Study Passport Procedures of the Association of the Bar of the City of New York, 16. It must also be noted that such "restrictions" were recommendations rather than prohibitions against travel to the particular country in question.

The instant case is the first before this Court in which the validity of the Secretary of State's area restrictions has been questioned. Another—*Frank* v. *Herter*, No. 14,978—was argued before a different bench in the Court.

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[1] In his news conference of May 14, 1957, the late Secretary of State Dulles said (The New York Times, May 15, 1957, p. 10):

"* * * Of course, the whole legal area as regards passports is somewhat in doubt, and there are pending a number of cases in the courts which, if they go up to the Supreme Court, will probably lead to some authoritative decision as to just what the functions and responsibilities of the Secretary of State are as regards passports. And whether or not it will be held that there is a right to travel everywhere which is superior to foreign policy, I don't know. If the courts so decide, naturally, I will accept such a decision. But as long as it is the practice, and so far as it is consonant with judicial opinions, to hold that the issuance of a passport involves foreign policy considerations—so long as that is the case, I will have to exercise my authority in accordance with what I judge to be the interests of the United States.

"Q. Would you like to see a court test made of that, sir? A. Yes. * * *"

of Appeals for the District of Columbia and a unanimous decision sustaining the Secretary's area restrictions was announced on July 6, 1959. In both cases, the Secretary, in justifying his area restrictions with reference to Communist China, has relied on his Passport Regulations which he claims are based both on express statutory authority as well as on the Executive's inherent powers in the field of foreign relations.

These Passport Regulations, which have adversely affected the lives of thousands of American citizens, have led to widespread scholarly and editorial criticism.[2] While no case other than petitioner's and *Frank* v. *Herter*, *supra*, is known to have questioned the Secretary's right to establish area restrictions pursuant to his Passport Regulations, it is understood that thirteeen applicants who attended the World Youth Festival in China in the Summer of 1957, who have either lost their passports or been denied renewals thereof, have unsuccesfully exhausted their administrative remedies and will shortly commence lawsuits in the United States District Court for the District of

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[2] See, for example: Parker, The Right to Go Abroad: To Have and to Hold a Passport, 40 Virginia L. R. 853 (1954); Barnett, Passport Administration and the Courts, 32 Oregon L. R. 193 (1953); Wyzanski, Freedom to Travel, Atlantic Monthly, October, 1952; Doman: A Comparative Analysis; Do Citizens Have the Right to Travel, 43 A. B. A. J. 307 (1957); Editorials: Chicago Daily Sun Times, November 26, 1955; New York Times, May 4, 1956; Denver Post, May 27, 1956.

Perhaps the most eminent critic of these passport policies is the former Secretary of State who himself promulgated the regulations of 1952; he characterizes them as "a grave mistake and a failure to foresee consequences which were inevitable." Acheson, A Democrat Looks at His Party (1955), p. 127.

The increasing concern of distinguished commentators is exemplified by such writings as O'Brian, National Security and Individual Freedom (1955), pp. 39, 48; Chafee, Three Human Rights in the Constitution (1956), pp. 162-214; Gelhorn, Individual Freedom and Governmental Restraints (1956), p. 15; Cushman, Civil Liberties in the United States (1956), pp. 113-116.

Columbia.[3] It has also been recently reported in the public press that Rep. Charles O. Porter of Oregon has filed suit against the present Secretary of State in an attempt to force that official to validate his passport for travel to China. (New York Times, August 28, 1959, p. 6)

In *Kent* v. *Dulles, supra*, this Court, for the second time in its history, had occasion to consider whether a litigant was entitled to a passport.[4] There, this Court held that the Secretary had no statutory authority to withhold passports from the litigants concerned. In the Court below, Judge Prettyman distinguished the instant case from *Kent* v. *Dulles* on the ground that the former involves only "political and military conditions in certain areas of the earth" and neither the beliefs, associations or personal characteristics of the applicant were concerned nor was protection against internal subversion a factor (Opinion, p. 2).

The magnitude of the problem is indicated further by the large numbers of citizens affected: More than a million Americans annually use passports for travel abroad; and over half a million passports are issued every year.[5]

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[3] The adverse decisions of the Board of Passport Appeals in the cases of Nina J. Landau, Sheila Greenberg, Warren McKenna, Guy Y. Caravan, Jacob Rosen, Elaine Hyman, Eli Moyer, Virginia Mattox, David H. Hollister, Samuel E. Hockman, Joanne Grant, Frederic V. Grab and Faye Goodman were rendered on June 10, 1959. According to their attorneys, lawsuits on their behalf will be filed momentarily.

[4] The first occurred in *Perkins* v. *Elg*, 307 U. S. 325 (1939). That case involved the single issue, whether the petitioner was a citizen; it did not involve the validity of the regulations here, which were promulgated many years later, or the constitutional problems here presented.

This Court denied certiorari in *Robeson* v. *Dulles*, 235 F. 2d 810, cert. den. 352 U. S. 845, where the petitioner, unlike those herein, had not pursued the administrative remedy. See Washington, J., Opinion, p. 29.

[5] Statistical Abstract of the United States, 1956, pp. 100-101.

1. Initially, there is presented the important question whether, in promulgating and enforcing the Passport Regulations, the Secretary of State has exceeded his statutory authority, a question which petitioner presumed was decided in the affirmative by this Court in *Kent* v. *Dulles* when it said that "We only conclude that s. 1185 and s. 211a do not delegate to the Secretary the kind of authority exercised here". (*Kent* v. *Dulles, supra,* at p. 129.)

2. The Passport Regulations explicitly purport to be based upon a single statute, 22 U. S. C. 211a. That statute, enacted in 1856, when the right to travel was not dependent upon a passport, only centralizes the function of passport issuance in the Secretary;[6] it does not authorize him to close off areas of the world to travel by American citizens during peacetime, or, for that matter, at any other time.

The Court below found that the Secretary's power to restrict travel to certain areas of the world rested, outside of the President's plenary power in the field of foreign relations and in addition to Section 211a, on another statute, 8 U. S. C. 1185. Section 1185, which is not cited in the Passport Regulations, merely states that Americans may not leave the United States without a passport. Neither statute nor 22 U. S. C. 212, which provides that passports shall only be issued to those "owing allegiance * * * to the United States", supports the Secretary's claim of authority to impose geographical restrictions. We submit that here, as in *Greene* v. *McElroy*, 360 U. S. 474, 507, before the head of an executive department is assumed to have such unusual powers—

> "it must be made clear that the President or Congress, within their constitutional powers specifically have decided that the imposed procedures are necessary and warranted and have authorized their use."

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[6] Dept. of State, The American Passport (1898), passim.

3. In construing these basic passport statutes, this Court, in *Kent* v. *Dulles*, *supra*, said:

> "The grounds for refusal asserted here do not relate to citizenship or allegiance on the one hand or to criminal or unlawful conduct on the other. Yet, so far as is relevant here, those two are the only ones which it could fairly be argued were adopted by Congress in the light of prior administrative practice" (p. 128).

It went on to point out:

> "* * * And, as we have seen, the right of exit is a personal right included within the word 'liberty' as used in the Fifth Amendment. If that 'liberty' is to be regulated, it must be pursuant to the lawmaking functions of the Congress. Youngstown Sheet & Tube Co. v. Sawyer, supra. And if that power is delegated, the standards must be adequate to pass scrutiny by the accepted tests. See Panama Refining Co. v. Ryan, 293 U. S. 388, 420-430. Cf. Cantwell v. Connecticut, 310 U. S. 296, 307; Niemotko v. Maryland, 340 U. S. 268, 271. Where activities or enjoyment, natural and often necessary to the well-being of an American citizen, such as travel, are involved, we will construe narrowly all delegated powers that curtail or dilute them. See Ex parte Endo, 323 U. S. 283, 301-302. Cf. Hannegan v. Esquire, 327 U. S. 146, 156; United States v. Rumely, 345 U. S. 41, 46. We hesitate to find in this broad generalized power an authority to trench so heavily on the rights of the citizen" (p. 129).

4. We therefore turn to those statutes in order to determine whether they show the intent of Congress to delegate this great power of restricting travel in peacetime to particular areas.

22 U. S. C. s. 211a authorizes the Secretary to "grant and issue passports * * * under such rules as the President shall designate and prescribe and on behalf of the United States, and no other person shall grant, issue or verify

such passports." There is certainly nothing in this language which authorizes the imposition of geographical restrictions.

22 U. S. C. s. 212 merely provides that: "No passport should be granted or issued to or verified for any other persons than those owing allegiance, whether citizens or not, to the United States." This provision equally fails to support the Secretary's claim of authority.

8 U. S. C. s. 1185, makes it unlawful in the event of war or national emergency "for any citizen of the United States to depart from or enter * * * the United States unless he bears a valid passport". Again there is nothing in this language which would support the claims of authority to determine whether American citizens may visit particular countries.

However, if the foregoing language were susceptible of the Secretary's construction, it would then be invalid on the ground indicated above by this Court, namely, that a delegation of power must contain adequate standards. The statutory provisions recited above contain no standards, adequate or otherwise, for the guidance of the Executive Branch. Thus, if viewed as a grant of power, the absence of standards would render the statute unconstitutional as an invalid delegation of law-making power, since Congress cannot delegate to the Executive power to make judgments and issue regulations which are legislative in character. *Miller* v. *United States*, 294 U. S. 435.

And since the right to travel is "an attribute of personal liberty", *Williams* v. *Fears*, 179 U. S. 270, 274, and "the right of exit is a personal right included within the word 'liberty' as used in the Fifth Amendment", *Kent* v. *Dulles*, *supra*, at 129, such standards, totally lacking here, would have to be especially precise. *Saia* v. *New York*, 334 U. S. 558, 560; *Cantwell* v. *Connecticut*, 310 U. S. 296; *Lovell* v. *Griffin*, 303 U. S. 444; *Hague* v. *C. I. O.*, 307 U. S. 496; *Niemotko* v. *Maryland*, 340 U. S. 268, 271; *Burstyn* v. *Wilson*, 343 U. S. 495.

5. The uncontrolled discretion which the view of the Court below would vest in the Secretary would render the statute clearly unconstitutional. "It is settled by a long line of recent decisions of this Court that (a statute) which, like this one, makes the peaceful enjoyment of freedoms which the Constitution guarantees contingent upon the uncontrolled will of an official—as by requiring a permit or license which may be granted or withheld in the discretion of such official—is an unconstitutional censorship or prior restraint upon the enjoyment of those freedoms." *Staub* v. *City of Baxley*, 355 U. S. 313, 322.

Statutes must be narrowly construed to avoid, rather than to create, constitutional problems, particularly where the suggested construction will, as here, concededly infringe upon fundamental rights. *United States* v. *Rumely*, 345 U. S. 41, 46; *United States* v. *Witkovich*, 353 U. S. 194.

6. The Secretary argues here, as in the *Kent* case, that he has an inherent foreign relations power under the Constitution to restrict appellant's travel. This claim cannot be upheld in this case any more than it was in the *Kent* case. Presidential "power must stem either from an Act of Congress or from the Constitution itself." *Youngstown Sheet and Tube Co.* v. *Sawyer*, 343 U. S. 579, 585. The President is constitutionally empowered to execute the laws, not to make them. The Secretary's determination that certain areas may not be visited is an exercise of lawmaking authority beyond the power of the Executive Branch.[7]

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[7] We have treated the regulations as if they had been promulgated by the President. Any power to control travel, whether it stems from a statute or otherwise, would reside not in the Secretary of State but in the President. However, the President has never delegated to the Secretary any of the powers that he may possess as President to control travel. Assuming that so drastic a power were capable of delegation under 3 U. S. C. §301, 65 Stat. 712, there has been no effort to apply or conform to that statute. (*Cf.* the Executive Orders in 3 U. S. C. § 301, 1957 Supp.).

The subject of foreign relations is not an exception to the constitutional restrictions upon presidential law making. Even the President's great power in the field of foreign relations has been exercised only in such clearly non-legislative matters as the recognition of foreign governments, *United States* v. *Belmont*, 301 U. S. 324; *United States* v. *Pink*, 315 U. S. 203; and the determination as to whether an embargo authorized by Congress should be invoked, *United States* v. *Curtiss-Wright Corp.*, 299 U. S. 304.

There is neither war nor actual national emergency requiring the exercise of the extraordinary power herein claimed by the Secretary. Appellant's travel could not conceivably have any adverse effect upon national security. Hence: "* * * We are not compelled to equate this present problem of statutory construction with problems that may arise under the war power" (*Kent* v. *Dulles*, *supra*, p. 128). As this Court added:

> "No such condition presently exists. No such showing of extremity, no such showing of joint action by the Chief Executive and the Congress to curtail a constitutional right of the citizen has been made here." (*Ibid.*)

7. The Department of State has vacillated on the subject of its power to prohibit travel to particular countries. Until quite recently it has neither imposed a ban upon travel nor asserted its right to do so. At most it has announced that the passport could not be used for such travel. Thus in Press Release No. 341, issued May 1, 1952, which stated that passports would be stamped "Not Valid for Travel" in certain countries, the then Secretary of State Dean Acheson added:

> "In making this announcement, the Department emphasized that this procedure in no way forbids American travel to those areas."[8]

It was not until last year that the Secretary denied travel rights to petitioner and to others solely by reason of their having visited Communist China.

This lack of authority to declare travel to certain areas illegal has been noted by government officials and other students of the problem.[9] Hence a distinguished Committee has found it necessary to recommend legislation "to clear up any doubts as to the possession by the Secretary of State of such authority." Freedom to Travel, Report of the Special Committee to Study Passport Procedures, of the Association of the Bar of the City of New York (1958), page 55; see also pages 51-52. Until such legislation is passed, the Secretary's restrictive passports and the imposition of sanctions upon travel to certain areas are clearly illegal.

8. The State Department is now of the view that "intentional violation by an American citizen of a passport geographic restriction of general applicability is grounds for the denial of further passport facilities in the absence of assurances by the citizen that he will in future abide by

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[8] Reprinted in The Right to Travel, Hearings before the Subcommittee on Constitutional Rights, Senate Committee on Judiciary, 85th Congress, 1st Sess., pursuant to S. Res. 49, p. 247. There is other evidence that this has been the Department's limited action generally. Thus its "list of the countries with respect to which passports have been stamped not valid for travel" contains no example of restrictions upon travel except in war situations. (Hearings before the Senate Committee on Foreign Relations, 85th Con., 1st Sess. (1957) on Department of State, Passport Policies, pp. 63-67.) In one instance, that of Bulgaria, "the Department informed two newsmen that there was no objection to the use, as a travel document, of an affidavit in lieu of a passport to which a Bulgarian affidavit could be affixed" (id. at 65).

[9] See *e.g.*, The Right to Travel, *supra*, passim.

such geographic restrictions" (Hearings, Senate Committee on Foreign Relations, 85th Cong., 2d Sess., on S. 2770 *et al.*, p. 26). With respect to such travelers the Department has added, "They had violated a restriction that was contained in their passport which is a criminal offense under our statutes." (*id.* at 38.) It might be pointed out that the Secretary has not prosecuted petitioner or, to our knowledge, any other person who has violated his area restrictions.

For one hundred years the Executive construed the passport statutes as authorizing only the power to issue regulations of an administrative character. It was not until 1958 that the statutes were invoked as a source of authority to prohibit peacetime travel to certain areas. In determining the meaning of these statutes, deference must be accorded to this century of administrative construction. *Swendig* v. *Washington Water Power Co.*, 265 U. S. 322; *National Lead Co.* v. *United States*, 252 U. S. 140; *Five Per Cent Cases*, 110 U. S. 471. The failure of the Secretary to assert any power to make substantive regulations for so long a period is a persuasive indication that no such power was ever granted. *Federal Trade Commission* v. *Bunte Bros.*, 312 U. S. 349.

9. Furthermore, geographical restrictions of the kind proposed by the Secretary violate the constitutional right of expatriation. This right has been recognized by Congress in the Expatriation Act of 1868, 15 Stat. 223, 224, R. S. s. 1999. The Supreme Court has described it as "natural and inherent." *Savorgnan* v. *United States*, 338 U. S. 491, 498-499.

10. The Secretary's refusal to validate petitioner's passport for travel to China has impaired his First Amendment rights, deprived him of his right to travel and to earn a livelihood as a foreign correspondent and to due process under the Fifth Amendment.

In *Kent* v. *Dulles, supra,* at page 126, this Court stated, "Travel abroad, like travel within the country, may be necessary for a livelihood. It may be as close to the heart of the individual as the choice of what he eats, or wears, or reads. Freedom of movement is basic in our scheme of values." It added: "Freedom of movement also has large social values." (*Ibid.*).

These statements are exemplified by appellant's present situation. He is a foreign correspondent and lecturer whose professional life and livelihood depend upon his ability to function in these capacities. It was of people such as appellant that the late Zechariah Chafee once wrote:

> "Foreign correspondents and lecturers on public affairs need first-hand information. Scientists and scholars gain greatly from consultations with colleagues in other countries. * * *" (Three Human Rights in the Constitution (1956), pp. 195-6), (*Kent* v. *Dulles, supra,* p. 126).

11. However, equally important in the scale of values is the right of the American people to know what is going on in China through other than official sources. Protection of petitioner's rights under the First Amendment will afford a more important protection to the American people of their right to knowledge. This is a necessary auxiliary to the democratic process since the American people must be able intelligently to exercise the great democratic power of the franchise and to influence official policies through informed public opinion.

This may explain the almost uniform criticism of the respondent in the halls of Congress, in the public press and elsewhere on the subject of restrictions upon the right of newspapermen to go to China. See *e.g.* Hearings Before the Committee on Foreign Relations, United States Senate, 85th Congress, 1st Session, on Department of State Passport Policies (April 1957) pp. 16, 20, 35; Editorials: Editor

& Publisher, Dec. 29, 1956, p. 6; Feb. 9, 1957, p. 6; New York Herald Tribune, Aug. 22, 1956, p. 18; Wall Street Journal, Aug. 8, 1956, p. 8; July 22, 1957, p. 10; New York Post, Jan. 3, 1957, p. 25; New York Times, Sept. 20, 1957; The Denver Post, Aug. 23, 1957; The Saturday Review, March 9, 1957.

It was this criticism which compelled the Secretary to adopt a modified "open door" policy on travel to China by allowing certain newspaper correspondents to visit that country. However, this limited and selective coverage of the news is hardly consistent with the requirement of the First Amendment that "Congress shall make no law * * * abridging the freedom of speech, or of the press * * * ".

12. Although the issues are not identical, we believe that the decision below is inconsistent with the decision of this Court in *Kent* v. *Dulles*, *supra*, and in fact conflicts with the holding in that case.

Petitioner, like Kent, is being denied any passport whatever by the Secretary of State. Now, as was true then, a passport is required by statute in order to leave the United States, except for such countries as have been exempted from the requirement by the President (Canada, Mexico and the Caribbean area). The statutes in effect today are exactly the same as were in effect at the time of the *Kent* case. As was true in that case, there is no express language authorizing the Secretary to deny a passport on the grounds advanced by the Secretary.

The Court considered the grounds for refusing passports "which it could fairly be argued were adopted by Congress in light of prior administrative practice." The Court found that the relevant practice was that existing prior to the Act of July 3, 1926. The Court's holding in *Kent* is based upon the proposition that the Secretary, at the most, may deny passports only as to those categories of persons as to whom there was an established administrative practice of denials that had "jelled" prior to 1926.

Petitioner here is being denied his passport on two grounds: 1) he travelled in the past to countries where the Secretary did not want him to travel; 2) he will not give the Secretary a special undertaking not to travel to countries where respondent does not want him to travel. We submit that neither of these grounds is authorized by statute because there was no administrative practice of such denials at any time in the past, and certainly not before 1926. We do not even know of any "scattered rulings" of "subordinates" which the Court found were insufficient to warrant the argument that Congress had adopted them. There was no practice of denying passports to persons who in the past had travelled where the Secretary did not want them to travel. There was no practice of denying passports to individuals who would not give a special commitment to limit their travel.

If the respondent has the authority to make it unlawful for certain people to travel to certain parts of the world (a proposition which we dispute) it does not necessarily follow that he has also been authorized to give administrative punishment to those who have broken his fiat by prohibiting them from travelling to any country. We submit that here, as in *Kent*, respondent is denying a passport to an individual because of past conduct. There the Secretary claimed authority to deny a passport to persons who had been Communists. Here the Secretary claims authority to deny passports to persons who have been to a Communist country. There the Secretary claimed the authority to deny a passport to one who would not file a statement as to Communist associations. Here he claims authority to deny a passport to one who will not file a statement as to future association and travel with Communists abroad. We submit that the Court, in holding that existing statutes could not be construed to give the Secretary the authority he claimed in *Kent*, necessarily held that the Secretary does not have the authority he claims here. The court below has decided this important federal question in

a way which conflicts with the applicable decision of this Court.

13. The Secretary's discrimination against petitioner in favor of other journalists violates his right to due process under the Fifth Amendment.

Petitioner is of the view that all American citizens are entitled, in peacetime at least, to travel throughout the world without interference, direct or indirect, by their government. If journalists have any additional rights, it is only as an incident of the right of the people to have access to the information which competent journalists can secure.

In the present case there is an additional reason why the Secretary's actions violate petitioner's rights under the due process clause of the Constitution. For the Secretary has yielded to the public pressure arising from what has become a national scandal by agreeing that twenty-four (now thirty) American newspapermen might travel to China. Yet petitioner who is in no different legal posture from these "chosen few" has been denied an equal right. More recently, permission to visit China has been granted by the Secretary to former Governor W. Averell Harriman and author Vincent Sheean, neither of whom could qualify as a full-time newspaperman bound, by the Secretary's decree, to remain in China for at least six months.

The Secretary in denying equal rights to petitioner was clearly violating his duty to act "in submission to the mandates of equality and liberty that bind officials everywhere." *Nixon* v. *Condon*, 286 U. S. 73, 88 (1932). Passport administration by the State Department is not immune to these requirements. As the statutory three-judge court said in *Bauer* v. *Acheson*, 106 F. Supp. 445, 452:

> "* * * We hold that, like other curtailments of personal liberty for the public good, the regulation of passports must be administered, not arbitrarily or capriciously, but fairly, applying the law equally to

> all citizens without discrimination, and with due process adapted to the exigencies of the situation * * *."

See also *Kraus* v. *Dulles*, 235 F. 2d 840, 842, where "arbitrary and capricious action" in the passport field was interdicted by the Court below.

The absolute and unrestricted discretion of the Secretary to invoke or to waive the Passport Regulations was asserted as the Department's principle by one of its principal officers. Before the Senate Subcommittee on Constitutional Rights, the Administrator of the Bureau of Security and Consular Affairs declared that

> "These are the regulations of the Secretary of State. Our theory is that he may waive these regulations on an ad hoc basis if he so desires to do so." Hearings before the Senate Committee on the Judiciary, Subcommittee on Constitutional Rights, Hearings, 84th Cong., 1st Sess. (1955), at 198.

If the undenied allegations of the petitioner are true, and if passports have in fact been validated for travel to China, it is clear that the pattern of erratic, devious, discriminatory and *ad hoc* "discretion" which has marked the passport administration over the last twelve years has persisted.

And if other journalists are permitted to travel to China, the Department's refusal to permit petitioner to do so is an unconstitutional discrimination against him. In *Yick Wo* v. *Hopkins*, 118 U. S. 356, 373-374, this Court said:

> "* * * Though the law itself be fair on its face and impartial in appliance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discrimination between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution." * * *

> "* * * the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself" (at 370).

Discriminatory applications of statutes and regulations "fair on (their) face" have been stricken down in various fields where human rights were affected, whether in the field of criminal procedural rights, private property rights, or civil and political rights, and both in the State and in the Federal areas. See *Griffin* v. *Illinois*, 351 U. S. 12, *Chicago, R. I. & P. R. Co.* v. *United States*, 284 U. S. 80 and *Gregory* v. *Barr*, 203 F. 2d 364.

The circumstances in which a discriminatory action by a regulatory agency will be excused may arise where it is clear that the agency is doing its best to administer the law uniformly. Thus in *Thompson* v. *Spear*, 91 F. 2d 430, 433, cert. den. 302 U. S. 762, which involved a State body, the Court said:

> "* * * It appears that the commission was making a diligent effort to enforce the law and regulations fairly and impartially but was unable to do so (because of inadequate funds and mild penalties, 91 F. 2d at 432). Its mere inability does not render such enforcement as it accomplished wrongful. * * *" (Bracketed matter added.)

On this basis enforcement as against the complainant was upheld. But the Court noted that where an agency "exercises its discretion arbitrarily and unjustly * * * enforcement of valid regulation becomes violative of the equal protection clause" (at 434).

As with the claim here on behalf of the Secretary to *ad hoc* enforcement powers, the agency in the *Thompson* case claimed that it was free to administer its own regulations in its own untrammelled discretion. The Court,

however, summarily rejected this contention. It held, at 434:

> "It cannot be said that, because the regulations * * * were promulgated by the commission in the exercise of a discretionary power, the commission has the discretion to proceed or refrain from acting under them. Having promulgated a regulation that is valid, fair, and just, it may not discriminate between those against whom it is intended to be enforced. Such enforcement would embody the very evils which would render it unlawful. If the commission may modify or repeal the provisions, this fact is likewise irrelevant."

The concept of "equal justice under law" applies in full vigor, of course, to civil and political rights. *Nixon* v. *Condon*, *supra*. Significantly, in buttressing its egalitarian ruling in *Griffin* v. *Illinois*, *supra*, it was to this area of rights that this Court turned. See the *Grandfather Clause* cases cited at 351 U. S. 17, n. 11. The prohibition of discrimination in this field by reason of color was, of course, the immediate object of the equal protection clause of the Fourteenth Amendment, and the cases implementing the prohibition on such discrimination are many. But the clause has been vindicated also against other acts of civil and political discrimination. See *McCoy* v. *Providence Journal Co.*, 190 F. 2d 760, cert. den. 342 U. S. 894; *Myerson* v. *Samuel*, 74 F. Supp. 315.

Insofar as some of the cases here cited involved the invalidation of discriminatory State and local action, they were, of course, based upon the equal protection clause of the Fourteenth Amendment rather than on the due process clause of the Fifth. But in *Bolling* v. *Sharpe*, 347 U. S. 497, 499, this Court said that while the two concepts were not invariably interchangeable, they were related, "both stemming from our American ideal of fairness." See also *Bowles* v. *Willingham*, 321 U. S. 503, 518; *Sims* v. *Rives*, 84 F. 2d 871, 878, cert. den. 298 U. S. 682.

It might also be pointed out that, in addition to the thirty newspapermen referred to above, the Secretary has also permitted three mothers and one brother of American prisoners held by the Chinese and an attorney representing defendants in a sedition prosecution to travel to Red China. Furthermore, former Senator George W. Malone entered Bulgaria and New York Times reporter Harrison E. Salisbury, Albania, when both were on the Secretary's "Index", without any apparent ill effect to them. In the summer of 1959, Mr. Salisbury also travelled in Outer Mongolia with which the United States has never had diplomatic relations and where no consular protection could be afforded him, again with no ill effects to him.

Conclusion

For the first time in American history, American citizens, with several dozen exceptions, are being denied the right to travel to certain designated areas of the world during peacetime. For the first time, a Secretary of State, in the absence of war, insurrection or rebellion, has arbitrarily closed off certain countries to travel by American citizens, reserving to himself the right to make discriminatory exceptions in favor of certain news media as he sees fit or, as former Governor Harriman charged in 1956, "to set himself up as an international assignment editor for the American press and broadcasting networks." New York Times, May 19, 1959, p. 8.

This case presents unusual, complex and far-reaching problems of a statutory, constitutional and practical nature which have only obliquely been considered by this Court. We are immediately concerned with a foreign correspondent who desires to travel to Communist China and other areas of world interest. But the Passport Regulations affect not only this citizen and the more than half a million annual passport applicants, but all American citizens who find that their right to travel is limited by the administra-

tive fiat of an official who reserves the right to determine where they can travel and who will be "the chosen few" to travel to certain foreign areas.

For more than a decade, we have been subjected to the undemocratic, devious and high-handed passport policies of the State Department. In *Kent-Briehl*, this Court struck down the Secretary's imposition of a political test as a prerequisite to the issuance of a passport. Here, we are presented with his insistence that he has the absolute power to close off vast areas of the world to travel by American citizens solely because he feels that it is in the best interests of the United States for him to do so. Such power in the hands of a single non-representative official is, at best, frightening and, at worst, a sign post on the road to tyranny. As Edward R. Murrow declared on CBS Radio two days after the decision below, under this ruling "it could happen" that all the world outside the United States could be declared off-limits to "all of us". Congressional Record, July 29, 1959, P. A6557.

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

September , 1959.

Respectfully submitted,

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Appendix A

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14806

WILLIAM WORTHY, JR.,

Appellant,

v.

CHRISTIAN A. HERTER, Secretary of State,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Decided June 9, 1959

MR. WILLIAM M. KUNSTLER, with whom MR. WALTER E. DILLON, JR., was on the brief, for appellant.

MR. F. KIRK MADDRIX, Attorney, Department of Justice, with whom MR. SAMUEL L. STROTHER, Attorney, Department of Justice, was on the brief, for appellee.

Before MR. JUSTICE BURTON, retired,* PRETTYMAN, Chief Judge, and WILBUR K. MILLER, Circuit Judge.

PRETTYMAN, *Chief Judge*: Our appellant, William Worthy, Jr., was a newspaperman duly accredited by the *Afro-American* Newspapers, the *New York Post*, and the Columbia Broadcasting System. In 1957 he applied for renewal of a passport originally issued to him in 1955.

* Sitting by designation pursuant to Sec. 294(a), Title 28, U. S. Code.

The passport contained a restriction stating it was not valid for travel to five named areas under control of authorities with which the United States does not have diplomatic relations, including the portions of China, Korea and Viet Nam under Communist control; and also a restriction against travel in Hungary. After various proceedings Worthy was asked whether he would make a commitment to abide the restrictions. He declined to do so, and the renewal was refused. The background for the refusal was that when the passport was originally issued it contained the same restrictions but Worthy nevertheless traveled extensively in both Communist China and Hungary. The refusal of the passport rested in no part upon Worthy's personal beliefs, writings or character. It was an application of the Secretary of State's general policy of refusing Government sanction to travel by United States citizens in certain areas of the world, presently under Communist control and deemed by him to be trouble spots.

We note immediately that the point here presented in no wise resembles the matter decided by the Supreme Court in *Kent* v. *Dulles*.[1] There the Court held that the Secretary refused passports because of the beliefs and associations of the applicants and that he had no statutory authority to refuse on such grounds. In the case at bar no beliefs, associations, or personal characteristics are involved. Nor is this a case in which the Secretary has proposed a restriction upon a passport for reasons of internal security, i.e., protection against internal subversion. The factors here are political and military conditions in certain areas of the earth.

Worthy makes four points. 1. He says the right to travel is a constitutional right and may be abridged only when there are overriding considerations of the public safety. 2. The Secretary lacks statutory authority to

[1] 357 U. S. 116 (1958).

deny a passport to prevent travel in these countries. 3. Alternatively, to the extent the refusal rests upon Executive power over foreign relations, it is still subject to applicable constitutional provisions, and the reasons given by the Secretary do not warrant this abridgment. 4. The refusal is an abridgment of the freedom of the press.

Worthy says, correctly, that the denial of a passport, under the statutes of today, must be justified as a denial of a right to travel; and he says, also correctly, that the right to travel is protected by the Constitution, being a part of the right to liberty. But the simple, succinct phrases of the Bill of Rights, indestructible protections to some of the fundamentals of our way of life, can be, and often are, expanded by rhetorical inflation beyond all semblance to the realities with which they were meant to deal. The right to travel is a part of the right to liberty, and a newspaperman's right to travel is a part of the freedom of the press. But these valid generalizations do not support unrestrained conclusions. For the maintenance and preservation of liberty, individual rights must be restricted for various reasons from time to time. In case of a clear and present danger to the national security, even so generally unrestrictable a right as speech can be restricted. In case of a reasonably anticipated threat to security or to law and order, many acts by individuals can be restricted. An assembling mob bent on disorder can be dispersed. A man with a contagious disease can be locked in his house. Potentially dangerous actions must be restricted in order to prevent harm to others. So we have sanitation, fire, building and speeding regulations.

Liberty itself is inherently a restricted thing. Liberty is a product of order. There is no liberty in anarchy or in chaos. Liberty is achieved by rules, which correlate every man's actions to every other man's rights and thus, by mutual restrictions one upon the other, achieve a result

of relative freedom. The mere day-to-day maintenance of the order which insures liberty requires restrictions upon individual rights. Some actions, neither harmful nor potentially dangerous, must be restricted simply for the sake of good order in the community. So we have parking, traffic and zoning regulations and rules of court.

No indivdual may take whatever he pleases, and so all others are free to enjoy their possessions. One man may not assault another with whom he disagrees, and this restriction protects the freedom of all to speak and live peacefully. One may not spread vicious lies about another, and so all are free to enjoy their good reputations. Every person is forbidden to join with his competitors to drive another person out of business, and so all are free to pursue their trades and buy products at reasonable prices. Everybody's liberty is restricted by prohibitions against driving recklessly, spreading disease, and leaving hidden dangers on property, and so the whole community is free to enjoy health. One cannot trample his neighbor's flower beds, or even trespass on his lawn. Even in a neighborhood community every man's right to roam is drastically restricted. A man who asserts his own uninhibited freedom to go where he pleases is a menace and is quickly put in his place. He may not park where he pleases, or drink where he pleases, or spit where he pleases. In the community the police take care of these matters, and in so doing the officers act as servants of the rest of the community; they are the government.

Freedom to worship as each one chooses is restricted in some ways. Worship by human sacrifice is forbidden. A member of one religion cannot interrupt the services of another religion in order to worship in his own way. Through this restriction all have freedom to worship as they choose.

Freedom of the press bears restrictions. It does not include the right to publish what another has registered

with the copyright office. Merely because a newsman has a right to travel does not mean he can go anywhere he wishes. He cannot attend conferences of the Supreme Court, or meetings of the President's Cabinet, or executive sessions of Committees of the Congress. He cannot come into my house without my permission, or enter a ball park without a ticket of admission from the management, or cross a public street downtown between crosswalks. He cannot pass a police cordon thrown about an accident, unless he has a pass from the police. A newsman's freedom to travel about is a restricted thing, subject to myriad limitations.

The peace-loving have rights. Those who recognize the fundamental necessities of liberty as a delicate product of order have power to protect themselves and their liberty. The liberty of everyone, law-abiding citizen and criminal alike, is involved in the maintenance of order and is threatened when disorder brings either the necessity or the opportunity for force to replace correlated rules of conduct. Such a threat may easily arise from conditions in foreign lands. The people have a right to protect their liberty, no matter whence the threat.

Indeed it is quite clear that those who cry the loudest for unrestricted individual freedom of action would be the loudest in bemoaning their fate if their plea were granted. The same release from constituted authority would set free persons so powerful, so ruthless, so bent on autocratic control that no newsman would have any liberty whatever. The customary prompt transformation of unrestrained liberty into dictatorship is one of the poignant lessons of history. These pleas for unrestricted individual freedom seem to us to be made upon a firm assumption that not too many people will be granted such liberty and not too much liberty in any event. Worthy himself says he does not plead for an unrestricted liberty for all people. His plea is for his own liberty to do what he happens to choose.

So we conclude on the point that the right to travel, like every other form of liberty, is, in our concept of an ordered society, subject to restrictions under some circumstances and for some reasons.

The next questions are what restrictions are here sought to be imposed by the Secretary and why he seeks to impose them.

Worthy seeks an unrestricted passport, so that he may travel anywhere in the world. He wishes especially to enter certain countries now under Communist control, which, like most others, require him to possess a valid United States passport. He advised the Board of Passport Appeals he had written Premier Chou En-lai that he sought "full information about any and all news stories, especially stories that involve the risk of war, as is the case with current Chinese-American issues over Taiwan, Quemoy and Matsu." The Secretary will not issue him a passport unless Worthy says he will not enter these designated countries. Thus Worthy is now free to travel in public places in the United States, Canada and Mexico, and if he agrees to the restrictions he will be free to travel in places open to foreigners in all countries which will grant him visas, except those named by the Secretary. The quantum by which Worthy's freedom has been reduced is the area of places open to foreigners in those of the six named countries which might grant him visas. No restrictions are proposed upon Worthy's thinking or writing. The restrictions proposed are on his physical presence in specified zones in foreign countries. They are restrictions upon acts, *i.e.*, travel.

The Secretary has given two separate but related reasons for this reduction of Worthy's freedom: (1) The areas named are potential or actual "trouble spots", where the presence of American citizens may place them in danger and further irritate our relations with the named countries and their allies. (2) The presence of

American citizens in these areas and the official approval of their presence there will impede the execution of American foreign policy in relation both to these countries and to other countries.

The facts which caused the Secretary to designate these places and to refuse official sanction of travel therein are shown us by the Secretary. Indeed they are established by many current events; they appear almost daily upon the front pages of the newspapers; they have been declared repeatedly by the President, his predecessors, and the Congress. We need not catalog them. The Korean difficulty with Communist China is still in the armistice stage, not finally settled. All trade with that part of China is prohibited. The situation in respect to Formosa and the small offshore islands, where we have a treaty of mutual defense, fluctuates in tensity. We oppose Communist China's membership in the United Nations. American citizens are held in hostage in that country. The reasons underlying the restriction on travel in Hungary are less numerous but amply sufficient. Unless almost the whole of our foreign policy and the titanic domestic burdens being presently borne by our people are devoid of factual foundation, there is presently in the world a deadlock of antagonistic forces, susceptible of erupting into a fatal cataclysm. The capacity of incidents arising from the conduct of individuals to ignite that conflagration is well proven. Worthy says the reasons averred by or available to the Secretary are insufficient to support the restriction of his passport. We hold they are ample.

Designations of restricted areas are made from time to time by the Secretary and thereafter are frequently withdrawn by him. Such has been a customary practice. For example, travel to Hungary was restricted on December 21, 1949, and the restriction was lifted upon the release of Robert Vogeler. The same thing happened in Czechoslovakia in 1951 in connection with the Oatis incident.

Appendix A

We think the designation of certain areas of the world as forbidden to American travelers falls within the power to conduct foreign affairs. The bare determination that certain areas outside this hemisphere are trouble spots, or danger zones, is a phase of "foreign affairs". Such a determination involves information gleaned through diplomatic sources and channels, and a judgment premised in large part upon foreign policy. The grounds upon which the President would make such a designation are foreign considerations, foreign affairs and policy. Indeed it would seem that such a restriction is in and of itself a foreign policy. It is at least an instrument of foreign policy. It depends upon this Government's attitude toward a foreign power and on that power's attitude toward us. Its locale is foreign territory. The assistance the Congress requires [2] the President to afford an American citizen in trouble abroad is a phase of "foreign affairs". The instrumentalities he must use to fulfill the congressional mandate are diplomatic, or foreign-service consular. A decision on the part of the President to prevent, if possible, the necessity for calling into play his diplomatic instrumentalities and the use of his powers—persuasive or compulsory—upon a foreign nation is a phase of "foreign affairs". The selection by him

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[2] 22 U. S. C. A. § 1732: "Whenever it is made known to the President that any citizen of the United States has been unjustly deprived of his liberty by or under the authority of any foreign government, it shall be the duty of the President forthwith to demand of that government the reasons of such imprisonment; and if it appears to be wrongful and in violation of the rights of American citizenship, the President shall forthwith demand the release of such citizen, and if the release so demanded is unreasonably delayed or refused, the President shall use such means, not amounting to acts of war, as he may think necessary and proper to obtain or effectuate the release; and all the facts and proceedings relative thereto shall as soon as practicable be communicated by the President to Congress."

of the means to be used in a given such case rests in large part upon policy, obviously foreign policy.

If then, the designation of a foreign area as a potential trouble spot is a "foreign affair" and the extrication of a citizen from trouble in a foreign country is a "foreign affair", is the refusal of the Executive to accord Government approval for a citizen to travel in such a designated area also a "foreign affair"? We think it is. The essence of the conduct of foreign affairs is the maintenance of peace, the prevention of war. The Constitution places that task of prevention in the hands of the Executive. The two correlative powers, to conduct war and to prevent war, are Executive functions under our Constitution.

Of course the prevention of clashes with foreign governments embraces diplomatic negotiations with those governments. But, as a matter of hard, practical reality, it also involves restrictions upon acts of our own citizens which may reasonably be foreseen as breeding clashes. History establishes that either the behavior or the predicament of an individual citizen in a foreign country can bring into clash, peaceful or violent, the powers of his own government and those of the foreign power. This is a fact, not a theory. The nub of the problem at bar revolves about a fact, not a supposititious theorem. The acts of individuals do cause clashes; the prevention of such acts does prevent clashes. Such clashes, whether diplomatic or military, involve "foreign affairs". The plight of airmen who have crossed borders, and the tense crises thereby created, are recent common knowledge. Surely the Executive can forbid such crossings by our airmen, commercial or private as well as military.

We think that, if the Executive foresees that the presence of American citizens in a designated foreign area may, by reason of military or political conditions there, evolve into, or be the occasion of, a clash, diplomatic or military, with a foreign government, his power in respect to foreign affairs includes power to refuse to sanction

the travel of American citizens in that area. To hold the contrary would be to hold that the protection of the peace against American-caused incidents in foreign countries is outside the realm of foreign affairs. Such latter holding would be both illogical and unrealistic. In foreign affairs, especially in the intimate posture of today's world of jets, radio, and atomic power, an individual's uninhibited yen to go and to inquire may be circumscribed. A blustering inquisitor avowing his own freedom to go and do as he pleases can throw the whole international neighborhood into turmoil. Worthy's avowed intent is to seek "especially stories that involve the risk of war".

The general principles governing the power of the Executive in foreign affairs are discussed by the Supreme Court in *Perez* v. *Brownell;*[3] *Chicago & Southern Air Lines* v. *Waterman Corp;*[4] and *American Communications Ass'n* v. *Douds,*[5] especially in Mr. Justice Jackson's concurring opinion.[6] We dealt with them at length in *Briehl* v. *Dulles.*[7] We think we need not here venture upon another extensive examination of that phase of our problem. It is settled that in respect to foreign affairs the President has the power of action and the courts will not attempt to review the merits of what he does. The President is the nation's organ in and for foreign affairs.[8]

Worthy says that a denial of the right to travel to certain places cannot be based on consideration of for-

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[3] 356 U. S. 44 (1958).
[4] 333 U. S. 103 (1948).
[5] 339 U. S. 382 (1950).
[6] *Id.* at 422.
[7] 101 U. S. App. D. C. 239, 248 F. 2d 561 (1957).
[8] Chicago & Southern Air Lines v. Waterman Corp., 333 U. S. at 109-111.

eign policy, because foreign policy is vague and fluctuating. This contention ignores the President's undisputed power to abridge various other rights on foreign policy grounds. The President may recognize foreign governments, make executive agreements,[9] and grant, deny or modify licenses for international air transportation. When the President exercises his authority in any of these fields, his decision may seriously affect the freedom of an American, "outside areas of plainly harmful conduct, * * * to shape his own life as he thinks best, do what he pleases, go where he pleases."[10]

The nature of the power of the President in the conduct of foreign affairs is well illustrated by the *Waterman* case, *supra*. The President's order to modify a license for overseas air transportation was in accordance with Section 601, Title 49, United States Code. That section provides that such licenses "shall be subject to the approval of the President." Congress laid down no standards or guide for him to follow. The President's justification for the change was that he had reached his decision "because of certain factors relating to our broad national welfare and other matters for which the Chief Executive has special responsibility * * *."[11] The Supreme Court held that the President's decision was guided by his foreign policy and was immune from judicial review. The dissenting Justices agreed with this proposition but thought that procedure before the Civil Aeronautics Board should be reviewable.

Worthy argues that the Secretary does not have statutory power to designate restricted geographical areas.

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[9] United States v. Pink, 315 U. S. 203 (942); United States v. Belmont, 301 U. S. 324 (1937).

[10] CHAFEE, THREE HUMAN RIGHTS IN THE CONSTITUTION OF 1787 (1956), p. 197, quoted in Kent v. Dulles, 357 U. S. at 126.

[11] 333 U. S. at 111.

We think, as we have indicated, that the President has ample power under the Constitution itself. His delegation to the Secretary is complete.[12] But, if the power to act rests upon statutes, we think the existing ones are clearly sufficient. Section 1185(b), Title 8, United States Code,[13] provides that, while a proclamation of national emergency is in force,[14] "it shall, except as otherwise provided by the President, and subject to such limitations and exceptions as the President may authorize and prescribe, be unlawful for any citizen of the United States to depart from or enter, or attempt to depart from or enter, the United States unless he bears a valid passport." The President delegated this authority to the Secretary by Proclamation No. 3004.[15] On this point we appeared, in *Briehl* v. *Dulles*, *supra*, to be in agreement. In his dissenting opinion Judge Bazelon said, referring to Proclamation No. 3004: "Thus read, it grants the Secretary discretion of the type already exercised in his existing travel control regulations, namely, to determine which parts of the world can be visited by Americans only if they have passports, but not to determine which Americans are to receive passports."[16] The 1926 Act contained the unequivocal provision: "The Secretary of State may grant and issue passports * * *."[17] The Supreme Court said in *Kent* v. *Dulles*:[18]

> "Under the 1926 Act and its predecessors a large body of precedents grew up which repeat over and

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[12] Proc. No. 3004, 67 Stat. C31 (1953); Exec. Order No. 7856, 3 Fed. Reg. 681 (1938).

[13] 66 Stat. 190 (1952).

[14] See Proc. No. 3004, *supra* note 12.

[15] *Ibid.*

[16] 101 U. S. App. D. C. at 259, 248 F. 2d at 581.

[17] 44 Stat. 887, 22 U. S. C. A. §211a.

[18] 357 U. S. at 124-125.

> again that the issuance of passports is 'a discretionary act' on the part of the Secretary of State. The scholars, the courts, the Chief Executive, and the Attorneys General, all so said."

If the Secretary has any discretion it seems to us it must include a discretion to prevent trouble when he reasonably foresees trouble. Without a preventive discretion, he has no discretion of any realistic content. Reasonable basis for the Secretary's anticipation of possible involvement appears in ample measure in this case. So we think the statutes, if they have any meaning at all, include power to do what the Secretary did in the case before us.

The *in terrorem* argument that to sustain the Secretary's power in this case is to confer upon him an unrestricted discretion to grant or to refuse passports is wholly unimpressive. He has not exercised such a discretion. He does not claim it, and we are not considering any such power in the remotest degree. The claimed power, so far as this case is concerned, is narrow and clearly delineated.

It is said that many of the incidents involved in the reported court cases dealing with foreign affairs were in time of war. But foreign affairs involve more than wars, and the President's powers over foreign affairs are not only war powers. As a matter of fact these are two separate powers in the Constitution. And, as a further matter of fact, governments have many more dealings with each other and problems concerning each other in peacetime than they do in wartime. Not only so, but, as we have already emphasized, the duty of the President to prevent war is as important as is his power to conduct one.

Worthy errs when he assumes that the Secretary has forbidden him to travel at all or that the action "is tantamount to imprisoning him." Worthy, so far as this record shows, can have a passport to travel all over the world

except in certain designated areas. He is in no sense imprisoned, except in the same rhetorical sense, although in less degree, that man is imprisoned because he is earthbound.

Worthy says situations which demand curtailment of constitutional rights must be of an exceptional and severe emergency nature—"clear and present danger", "gravest imminent danger", etc. Several comments may be made. In the first place the nature of the right and the nature of the restriction are important. As we have already pointed out, the right here involved is not a right to think or speak; it is a right to be physically present in a certain place. The basis of the restriction is not personal but is the military and political situation in the designated areas. In the second place there is a grave, clear and present danger, as we have indicated. When a gunman points a loaded gun, one need not await the report from a shot to know that danger is clear and present. The contention that there is no grave danger involved in the wanderings of uninhibited American newsmen in China or in Hungary today reflects an unawareness of realities. In the third place the Constitution puts in the President the authority to evaluate the military and political exigencies in foreign countries. The courts are the least able of all organs of government to make such evaluations, and they are wholly without authority to make them.

Worthy says the presence of Americans, at least of American newsmen, in the restricted areas would better our foreign relations rather than worsen them. This is an argument he should make to the President or the Congress. The authority to determine what would and what would not better our foreign relations is not vested in individual citizens, even though they be newsmen, any more than authority to declare a damaged wall in a newsman's home town dangerous or not dangerous is vested in him. The Fire Chief determines that condition and enforces his conclusion.

To order the Secretary of State to do something, because we believe it would be better for our foreign relations than his plan, would be a gross usurpation of Executive powers. Judgment on what course of action will best promote our foreign relations has been entrusted to the President, not to the courts, journalists, scholars, or even "public opinion". He makes his decision with the aid of the Department of State; a large organization with stations throughout the world, as well as on the basis of information received from all other parts of the Executive branch. We, if we had all this information, might reach a different decision. But the Constitution has wisely placed that burden in the hands of one who must justify his decisions before the electorate.

The judgment of the District Court is

Affirmed.

Appendix B

22 U. S. C. § 211(a)

The Act of July 3, 1926, 44 Stat. 887, 22 U. S. C. § 211(a) provides, in pertinent parts, as follows:

> "The Secretary of State may grant and issue passports, and cause passports to be granted, issued, and verified in foreign countries by diplomatic representatives of the United States, and by such consul generals, consuls, or vice consuls when in charge, as the Secretary of State may designate, and by the chief or other executive officer of the insular possessions of the United States, under such rules as the President shall designate and prescribe for and on behalf of the United States, and no other person shall grant, issue, or verify such passports."

22 U. S. C. § 212

The Act of June 14, 1902, 32 Stat. 386, 22 U. S. C. § 212 provides, in pertinent part, as follows:

> "No passport shall be granted or issued to or verified for any other persons than those owing allegiance, whether citizens or not, to the United States."

Internal Security Act of 1950, § 6

Section 6 of the Internal Security Act of 1950, 64 Stat. 993, 50 U. S. C. § 785 provides, in pertinent part, as follows:

> "(a) When a Communist organization as defined in paragraph (5) of Section 782 of this title is registered, or there is in effect a final order of the Board requiring such organization to register, it shall be unlawful for any member of such organization, with knowledge or notice that such organization is so registered or that such order has become final—

(1) to make application for a passport, or the renewal of a passport, to be issued or renewed by or under the authority of the United States; or.

(2) to use or attempt to use any such passport.

(b) When an organization is registered, or there is in effect a final order of the Board requiring an organization to register, as a Communist-action organization, it shall be unlawful for any officer or employee of the United States to issue a passport to, or renew the passport of, any individual knowing or having reason to believe that such individual is a member of such organization."

8 U. S. C. § 1185

Section 215 of the Immigration and Nationality Act of 1952, 66 Stat. 190, 8 U. S. C. § 1185, as codified, provides in pertinent part:

"§ 1185. Travel control of citizens and aliens during war or national emergency—Restrictions and prohibitions on aliens.

(a) When the United States is at war or during the existence of any national emergency proclaimed by the President, * * * and the President shall find the interests of the United States require that restrictions and prohibitions in addition to those provided otherwise than by this section be imposed upon the departure of persons from and their entry into the United States, and shall make public proclamation thereof, it shall, until otherwise ordered by the President or the Congress, be unlawful—

(1) (There follow restrictions enumerated (1) through (7) not here pertinent.)

(b) After such proclamation as is provided for in subsection (a) of this section has been made and published and while such proclamation is in force, it shall, except as otherwise provided by the President, and subject to such limitations and exceptions as the President may authorize and prescribe, be unlawful for any citizen of the United States to de-

part from or enter, or attempt to depart from or enter, the United States unless he bears a valid passport."

The Expatriation Act of 1868

The Expatriation Act of 1868, 15 Stat. 223-224, R. S. § 1999, 8 U. S. C. § 800 (1940 Supp.) reads as follows:

> "Whereas the right of expatriation is a natural and inherent right of all people, indispensable to the enjoyment of the rights of life, liberty, and the pursuit of happiness; and whereas in the recognition of this principle this government has freely received emigrants from all nations, and invested them with the rights of citizenship, and whereas it is claimed that such American citizens, with their descendants, are subjects of foreign states, owing allegiance to the governments thereof; and whereas it is necessary to the maintenance of public peace that this claim of foreign allegiance should be promptly and finally disavowed: Therefore,
>
> Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That any declaration, instruction, opinion, order, or decision of any officers of this government which denies, restricts, impairs, or questions the right of expatriation, is hereby declared inconsistent with the fundamental principles of this government."

Proclamation 3004

The pertinent portions of Presidential Proclamation No. 3004, January 17, 1953, 67 Stat. c. 31, entitled "Control of Persons Leaving or Entering the United States By the President of the United States of America," are as follows:

> "A Proclamation
>
> Whereas Section 215 of the Immigration and Nationality Act, enacted on June 27, 1952 (Public Law 414, 82nd Congress; 66 Stat. 163, 190), authorizes the President to impose restrictions and prohibitions in addition to those otherwise provided by

that Act upon the departure of persons from, and their entry into, the United States when the United States is at war or during the existence of any national emergency proclaimed by the President * * * and when the President shall find that the interests of the United States so require; and

Whereas the national emergency the existence of which was proclaimed on December 16, 1950, by Proclamation 2914 still exists; and

Whereas because of the exigencies of the international situation and of the national defense then existing Proclamation No. 2523 of November 14, 1941, imposed certain restrictions and prohibitions in addition to those otherwise provided by law, upon the departure of persons from and their entry into the United States, and

Whereas the exigencies of the international situation and of the national defense still require that certain restrictions and prohibitions, in addition to those otherwise provided by law, be imposed upon the departure of persons from and their entry into the United States:

NOW, THEREFORE, I, HARRY S. TRUMAN, President of the United States of America, acting under and by virtue of the authority vested in me by section 215 of the Immigration and Nationality Act and by section 301 of title 3 of the United States Code, do hereby find and publicly proclaim that the interests of the United States require that restrictions and prohibitions, in addition to those otherwise provided by law, be imposed upon the departure of persons from, and their entry into, the United States; and I hereby prescribe and make the following rules, regulations, and orders with respect thereto:

1. The departure and entry of citizens and nationals of the United States from and into the United States, including the Canal Zone, and all territory and waters, continental or insular, subject to the jurisdiction of the United States, shall be subject to the regulations prescribed by the Secretary of State and published as sections 53.1 to 53.9 inclusive, of title 22 of the Code of Federal Regulations.

Such regulations are hereby incorporated into and made a part of this proclamation; and the Secretary of State is hereby authorized to revoke, modify, or amend such regulations as he may find the interests of the United States to require.

5. I hereby direct all departments and agencies of the Government to cooperate with the Secretary of State in the execution of his authority under this proclamation and any subsequent proclamation, rule, regulation, or order issued in pursuance hereof; and such departments and agencies shall upon request make available to the Secretary of State for that purpose the services of their respective officials and agents. I enjoin upon all officers of the United States charged with the execution of the laws thereof the utmost diligence in preventing violations of section 215 of the Immigration and Nationality Act and proclamation, including the regulations of the Secretary of State incorporated herein and made a part hereof, and in bringing to trial and punishment any persons violating any provisions of that section or of his proclamation.

To the extent permitted by law, this proclamation shall take effect as of December 24, 1952."

Executive Order No. 7856

Executive Order No. 7856, 22 C. F. R. §§ 51.1-51.74 is entitled and constitutes the "Rules Governing the Granting and Issuing of Passports in the United States." Several typical excerpts from that extensive document are set forth to indicate that it relates to procedural rather than to substantive matters:

* * *

"3. Unless a request is made by the parental or other guardian that a passport be denied, passports may be issued to minors upon their own application.

4. Children may execute applications in their own behalf when of sufficient intelligence to understand the statements, and the meaning of the oath of allegiance to the United States, contained in the application.

* * *

10. A minor brother or sister may be included in the passport of an older brother or sister.

• • •

39. The applicant must submit with his application duplicate photographs not more than 3 x 3 inches and not less than 2½ by 2½ inches in size, unmounted, printed on thin paper on a light background, showing the full front view of the features of the applicant, and taken within six months of the date they are submitted.

40. When the applicant applies for a passport he should be accompanied by one credible witness who is an American citizen, has known the applicant for a period of two or more years, and has a definite place of residence.

• • •

119. The Secretary of State may require such additional evidence of citizenship as in his judgment may be necessary to establish the citizenship of an applicant for a passport."

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Regulations of the Secretary of State
22 C. F. R. § 51.136

On August 28, 1952 the Secretary adopted the passport regulations herein involved with the following preamble (17 F. R. 8013):

Pursuant to the authority vested in me by paragraph 126 of Executive Order No. 7856, issued on March 31, 1938 (3 F. R. 681; 22 C. F. R. 5177) under authority of Section 1 of the Act of Congress approved July 3, 1926 (44 Stat. 887; 22 U. S. C. 211(a)), the regulations issued on March 31, 1938 (Departmental Order 749) as amended (22 C. F. R. 51.101 to 51.134) are hereby further amended by the addition of new sections 51.135 to 51.143 as follows:

§ 51.136, as amended, reads as follows:

"§ 51.136 * Limitations on Issuance of passports to certain other persons. In order to promote and safeguard the interests of the United States, passport facilities, except for direct and immediate return to the United States, will be refused to a person when it appears to the satisfaction of the Secretary of State that the person's activities abroad would: (a) violate the laws of the United States; (b) be prejudicial to the orderly conduction of foreign relations; or (c) otherwise be prejudicial to the interests of the United States."

22 C. F. R. § 8

§ 53.8 Discretional exercise of authority in passport matters.—Nothing in this part shall be construed to prevent the Secretary of State from exercising the discretion resting in him to refuse to issue a passport, to restrict its use to certain countries, to withdraw or cancel a passport already issued, or to withdraw a passport for the purpose of restricting its validity or use in certain countries.

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* Prior to the Secretary's amendment of January 18, 1956, 21 F. R. 336, this section read as follows:

"§ 51.136. Limitations on Issuance of Passports to Persons Likely to Violate Laws of the United States. In order to promote the national interest by assuring that the conduct of foreign relations shall be free from unlawful interference, no passport, except one limited for direct and immediate return to the United States, shall be issued to persons as to whom there is reason to believe, on the balance of all the evidence, that they are going abroad to engage in activities while abroad which would violate the laws of the United States, or which if carried on in the United States would violate such laws designed to protect the Security of the United States."

Appendix C

Judgment

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA

No. 14,806

September Term, 1958

C. A. 916-58

—o—

WILLIAM WORTHY, JR.,

Appellant,

v.

CHRISTIAN A. HERTER, Secretary of State,

Appellee.

—o—

Filed June 9, 1959.

JOSEPH W. STEWART,
Clerk.

Appeal from the United States District Court for the District of Columbia.

Before: MR. JUSTICE BURTON, retired, PRETTYMAN, *Chief Judge*, and WILBUR K. MILLER, *Circuit Judges*.

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration whereof, It is ordered and adjudged by this Court that the judgment of the District Court appealed from in this cause be, and it is hereby, affirmed.

Dated: June 9, 1959.

Per CHIEF JUDGE PRETTYMAN.